Bloomberg BNA

Class Action Litigation Report®

Reproduced with permission from Class Action Litigation Report, 15 CLASS 1400, 12/12/2014. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

CERTIFICATION

SUPREME COURT

Understanding *Halliburton* in Light of Recent Supreme Court Jurisprudence

BY JASON M. HALPER, E. JOSHUA ROSENKRANZ AND WILLIAM J. FOLEY

In recent years, the Supreme Court has decided a number of cases that, alone and certainly in the aggregate, have significantly impacted the ability of plaintiffs to initiate and maintain class actions.

By and large, these decisions have opened up new avenues for companies to prevent plaintiffs from commencing class actions in the first place or for defendants successfully to challenge class certification. In particular, and as discussed previously by the authors,[1] the Court in a series of decisions has upheld the ability of contracting parties to eliminate class procedures in arbitration; raised the bar for plaintiffs to obtain class certification by requiring them to prove each of the Rule 23 prerequisites at the class certification stage; and barred courts from applying the federal securities law to predominantly extraterritorial investors and transactions, thereby eliminating such class actions.

As explained in the Court's opinions, these decisions were premised on an adherence to congressional intent as reflected in statutory text, which to the Court overrode other considerations that might have warranted a contrary result.

Among the most, if not the most, highly anticipated of the recent class action decisions was *Halliburton Co. v. Erica P. John Fund, Inc.*, 2014 BL 172975 (U.S. 2014) ("*Halliburton II*"). But the result in *Halliburton II* is difficult to square with the Court's recent class action jurisprudence. The *Halliburton II* Court considered the

Jason M. Halper, a partner at Orrick, serves as Co-Head of its Financial Institutions Litigation Practice and is resident in New York. Halper can be reached at jhalper@orrick.com.

E. Joshua Rosenkranz, also a partner, serves as Head of Orrick's Supreme Court and Appellate Practice in the firm's New York office. Rosenkranz is available at jrosenkranz@orrick.com.

William J. Foley, a managing associate in Orrick's Securities Litigation and Regulatory Enforcement Practice Group in New York, can be contacted at wfoley@orrick.com.

[1] *See, e.g.*, Jason M. Halper & Ryan J. Andreoli, *Arbitration Clauses and Class Certification Standards: How the Supreme Court Is Limiting Plaintiffs' Ability to Maintain Class Actions*, Bloomberg BNA: Class Action Report, Jan. 25, 2013; Jason M. Halper & Ryan J. Andreoli, *Class Action Issues in Supreme Court: Assessing the Significance of Amgen*, 249 N.Y.L.J. 4 (Apr. 3, 2013).

COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1529-0115

continuing vitality of the fraud-on-the-market presumption in claims asserting violations of Section 10(b) of the Securities Exchange Act of 1934 (the ''Exchange Act'').[2] In particular, the Court had the opportunity to jettison the presumption—a classic example of judge-made law originally articulated in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)—in favor of faithful observance of statutory text. Instead, *Halliburton II* retained the fraud-on-the-market presumption, and in so doing, preserved the ability of plaintiffs to assert Section 10(b) claims as class actions.

This article examines *Halliburton II* alongside other Supreme Court decisions over the last several years that have had the effect of limiting the availability of the class action device, discusses recent lower court decisions applying this precedent, and explores how defendants are using or could consider employing the applicable case law to defeat class certification. Some of these recent Supreme Court decisions confront Rule 23 issues directly, while others touch on class action issues more tangentially. But they have all been favorable to class-action defendants. This article argues that *Halliburton II* appears to be somewhat of a departure from those cases. However, there is room within the *Halliburton II* decision for securities class action defendants to make powerful arguments at the class certification stage that in practice were not available before *Halliburton II*.

Demanding Proof that Rule 23 Class Certification Standards Are Satisfied

Prior to *Halliburton*, the Supreme Court had issued a number of decisions that had the effect of making it more difficult for plaintiffs to obtain class certification under Federal Rule of Civil Procedure 23 (''Rule 23''). For the most part, these opinions rely on the principle that a plaintiff must affirmatively demonstrate that the prerequisites to certification set forth in Rule 23 are satisfied before class certification can be granted.

Rule 23 requires plaintiffs seeking class certification to establish that: (1) the class is so numerous that joinder of class members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of those of the class; and (4) the class representatives will fairly and adequately protect the interests of the class. *See* Rule 23(a). Plaintiffs also must satisfy one of the following requirements under Rule 23(b): (1) prosecuting individual actions risks either inconsistent adjudications or would be dispositive of the interests of others; (2) defendants have acted or refused to act on grounds generally applicable to the class; or (3) there are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication. *See* Rule 23(b).

Recent Supreme Court jurisprudence has directed district courts to conduct an in-depth analysis into whether plaintiff has satisfied Rule 23 prerequisites at the class certification stage, even if those questions are implicated by the merits of plaintiffs' claims. Not surprisingly, raising the bar for class certification will limit the number of putative class actions that are certified (and continue to settlement or trial), and may also have the effect of reducing the overall number of class actions filed.

In *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (2011), a case concerning alleged discriminatory employment practices in violation of Title VII, Wal-Mart opposed class certification on the ground that plaintiffs could not show commonality under Rule 23(a)—''that 'there are questions of law or fact common to the class.' '' *Id.* at 2550-51. In particular, Wal-Mart argued that plaintiffs could not demonstrate that there was a single, countrywide discriminatory policy. The district court certified the class, finding that Wal-Mart's commonality argument required the court to probe too deeply at the class certification stage into issues implicating the merits of plaintiff's claims. The Ninth Circuit affirmed, but the Supreme Court reversed, finding that ''actual, not presumed, conformance with Rule 23(a) remains . . . indispensable.'' *Id.* at 2551.

Additionally, Justice Scalia's opinion held that the ''rigorous analysis'' of whether the ''prerequisites of Rule 23(a) have been satisfied 'will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.' '' *Id.* at 2551. The Court then analyzed plaintiffs' evidence of a common pattern or practice of discrimination—evidence that went to the merits of plaintiffs' claims—because it was also necessary to assess ''commonality'' under Rule 23(a). *Id.* at 2552. The Court held that plaintiffs ''provide[d] no convincing proof of a companywide discriminatory pay and promotion policy,'' and thus had ''not established the existence of any common question'' under Rule 23(a). *Id.* at 2556-57. Thus, the Court found that plaintiffs' class had been improperly certified. *Id.* at 2561.

Following *Dukes*, the Supreme Court decided *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), which addressed whether certification is proper where plaintiffs had failed to establish that damages could be measured on a classwide basis. In *Comcast*, a putative class of television subscribers filed an antitrust suit alleging that Comcast and other cable providers engaged in a ''clustering'' scheme ''by acquiring competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region.'' *Id.* at 1430.

Plaintiffs asserted that the clustering scheme harmed subscribers in Philadelphia ''by eliminating competition and holding prices for cable services above competitive levels'' in violation of the Sherman Act. *Id.* At issue at class certification was whether damages were measurable on a classwide basis through the use of a ''common methodology.'' *Id.* While the district court rejected three of plaintiffs' damages theories, the court certified a class based on the fourth theory of damages. *Id.* at

[2] The fraud-on-the-market presumption articulated in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), rests on an economic theory known as the Efficient Capital Markets Hypothesis (''ECMH''), which posits that securities prices rapidly adjust to reflect new public information impacting the underlying value of the securities being traded. In such an ''efficient'' market, investors are justified in relying on the market price as a substitute for investigating corporate reports, which should be reflected in the market price. Any misrepresentation by the issuer would also be incorporated into the price until there is a corrective disclosure. The presumption that an investor who buys or sells stock on an efficient market is relying on the integrity of that price renders the issue of reliance common to the class.

 COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1529-0115

1431-32. The Third Circuit affirmed, and the Supreme Court granted *certiorari*.

The Supreme Court, in a majority opinion authored by Justice Scalia, reversed. The opinion began by echoing *Dukes* in stating that Rule 23 ''does not set forth a mere pleading standard,'' but rather a party must ''be prepared to prove that there are *in fact* . . . common questions of law or fact'' as required by Rule 23(a). *Id.* at 1432. After observing that the ''rigorous analysis'' undertaken at the class certification stage ''will frequently entail 'overlap with the merits of the plaintiff's underlying claim,' '' the Court examined plaintiffs' damages model and found that it ''failed to measure damages resulting from the particular antitrust injury on which [Comcast's] liability in this action is premised.'' *Id.* at 1433. Because the class damages model was flawed, ''[q]uestions of individual damages calculations inevitably overwhelm questions common to the class,'' and thus the Court denied class certification under Rule 23(b)(3). *Id.*

Over the past few years, lower courts have relied on *Dukes* and *Comcast* to deny class certification. *See, e.g.*, *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 Fed. App'x. 782, 790 (11th Cir. 2014) (district court's order granting class certification ''was an abuse of discretion, in light of the Supreme Court's decision in *Comcast*''); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1219 (10th Cir. 2013) (vacating certification order and noting that ''the *Comcast* Court made clear that it may be necessary for a district court to probe behind the pleadings before deciding whether Rule 23(b)'s requirements have been met''); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 358 (3d Cir. 2013) (vacating certification order where trial court failed to ''engage in a 'rigorous analysis' '' under *Dukes* to ''find each of Rule 23(a)'s requirements met by a preponderance of the evidence'') (citation omitted).

One such recent case, *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133 (N.D. Tex. 2014), is instructive. *Kosmos* concerned a purported securities class action brought under Sections 11, 12 and 15 of the Securities Act of 1933. Plaintiffs, investors in oil and gas producer Kosmos Energy, alleged that the company made false and misleading statements in a registration statement issued in connection with Kosmos Energy's IPO. *See id.* at 135. When plaintiffs moved to certify the class, Kosmos Energy argued that the lead plaintiff ''failed to satisfy the exacting evidentiary burdens imposed on parties seeking class certification under Fed. R. Civ. P. 23(a) and (b)(3).'' *See id.* at 136.

In its analysis, the district court discussed the ''evolution of the case authority on class certification'' in both the Fifth Circuit and Supreme Court, including *Comcast* and *Dukes*. *See* 299 F.R.D. at 137-39 (''Going forward, the clear directive to plaintiffs seeking class certification—in any type of case—is that they will face a rigorous analysis by the federal courts, will not be afforded favorable presumptions from the pleadings or otherwise, and must be prepared to prove *with facts*—and by a preponderance of the evidence—their compliance with the requirements of Rule 23.'').

After applying the ''rigorous analysis'' mandated by *Comcast* and *Dukes*, the district court denied plaintiffs' motion for class certification, finding that plaintiffs could not satisfy the adequacy and predominance requirements of Rule 23. *See id.* at 154. First, under Rule 23(a), class plaintiffs must show that the lead plaintiffs will ''fairly and adequately protect the interests of the class.'' Fed. R. Civ. P. 23(a)(4). The district court found that lead plaintiff's sole evidence of adequacy, a two-page declaration, ''provide[d] scant factual detail,'' and omitted the typical adequacy factors such as: (i) close affiliation with and dependence upon class counsel, (ii) knowledge of the basic facts of the case and defendants involved, and (iii) desire to vigorously prosecute the case. *See id.* at 148. Second, with respect to Rule 23(b) predominance, the requirement that ''questions of law or fact common to class members predominate over any questions affecting only individual members'' (Fed. R. Civ. P. 23(b)(3)), the district court found that plaintiffs failed to submit any evidence demonstrating predominance. *See id.* at 151. In light of these shortcomings, the district court found that plaintiffs ''fail[ed] the rigorous test posed by . . . *Wal-Mart* and *Comcast*.'' *See id.* at 148.[3]

Adherence to the FAA: The Court's Pro-Arbitration Jurisprudence

Over the last few years, the Supreme Court has issued a number of ''pro-arbitration'' (and, arguably, ''anti-class action'') decisions under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (''FAA''). In 2010, the Supreme Court issued the first of its recent decisions concerning plaintiffs' ability to arbitrate as a class. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), the Court held that where a commercial contract contains an arbitration agreement that is *silent* as to class procedures (*i.e.*, it requires arbitration, but does not specify whether the plaintiff may arbitrate as part of a class), it should not be construed to allow class arbitration. *See id.* at 684 (''a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so''). According to the Court, arbitrators cannot ''presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.'' *Id.*

[3] In the near future, the Court may take the opportunity to address yet another issue arising from class certification questions. Currently before the Court is a petition for *certiorari* from a Fifth Circuit decision that created a circuit split regarding whether a class may be certified even if some of its members cannot demonstrate fundamental Article III standing requirements, including that defendant's conduct caused plaintiff's injury. In *In re Deepwater Horizon*, 739 F.3d 790, 799 (5th Cir. 2014), the Fifth Circuit affirmed the district court's certification of a settlement class arising from the BP Gulf Coast oil spill even though the class included members '' 'who suffered no harm caused by the *Deepwater Horizon* incident.' '' *Id.* Although the Fifth Circuit declined to review the finding *en banc*, several judges dissented from the denial of rehearing, contending that the panel's decision created a split with other circuits, including the Second Circuit, which held that ''no class may be certified that contains members lacking Article III standing.'' *In re Deepwater Horizon*, 756 F.3d 320, 323 (5th Cir. 2014) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (putative class members must show ''that all class members were in fact injured by the alleged [harm]''); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) (''In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant.'').

at 687. At its core, the Court's decision was based on the ''foundational FAA principle'' that arbitration is a matter of consent. *Id.* at 684.

The next year, the Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which concerned contracts that expressly prohibited class arbitration. The *Concepcion* plaintiffs argued that arbitration provisions that included a class waiver were unconscionable and unlawfully exculpatory under the California Supreme Court's decision in *Dscover Bank v. Superior Court of L.A.*, 36 Cal. 4th 148 (Cal. 2005).[4] The Supreme Court rejected plaintiffs' argument, finding that ''[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'' *Id.* at 1748. Specifically, the majority held that ''[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: *The conflicting rule is displaced by the FAA*.'' *Id.* at 1747 (emphasis added). Thus, *Concepcion* found that the ''*Discover Bank* rule is preempted by the FAA.'' *Id.* at 1753.[5]

In *Stolt-Nielsen* and *Concepcion*, the Court had relied upon the FAA to endorse class-waiving arbitration provisions (both implicit and explicit). But the lower courts were not uniformly enforcing such agreements to arbitrate on an individual basis. For instance, the Second Circuit continued to refuse to enforce arbitration provisions containing class waivers where individual arbitration would be ''uneconomic'' for a lone plaintiff.[6] The Supreme Court addressed this issue in mid-2013 in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (''*AmEx*'').

AmEx considered ''whether a contractual waiver of class arbitration is enforceable under the [FAA] when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.'' *Id.* at 2307. The plaintiffs in *AmEx* were restaurants that alleged that American Express ''used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards,'' a tying arrangement that allegedly violated the Sherman Act. *Id.* at 2308.

While the parties' agreement included an arbitration clause and a class waiver (''[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis''), plaintiffs argued that these provisions were unenforceable because the costs of individual arbitration would far exceed any potential recovery, making it uneconomic to arbitrate plaintiffs' claims. *See id.* (plaintiffs ''submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed $1 million,' while the maximum recovery for an individual plaintiff would be $12,850'').

The Southern District of New York rejected plaintiffs' argument and dismissed the lawsuits based on the parties' agreement to arbitrate. The Second Circuit reversed, finding that plaintiffs had established that they ''would incur prohibitive costs if compelled to arbitrate under the class action waiver,'' and thus, the waiver was unenforceable and the arbitration could not proceed. *See id.*[7] (citation omitted). According to the Second Circuit's analysis, before compelling individual arbitration, a district court would have to determine that the costs of succeeding on the merits of each claim (and costs of developing the relevant evidence) would not exceed damages. *Id.* at 2312.

The Supreme Court reversed, finding that the ''FAA does not sanction such a judicially created superstructure.'' *Id.* Rather, the Court found that arbitration is ''a matter of contract,'' and thus that courts must '' 'rigorously enforce' arbitration agreements according to their terms.'' *Id.* at 2309. In a 5-3 majority[8] written by Justice Scalia, the Court held that ''the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.'' *Id.* at 2311.[9]

Morrison and the Presumption Against Extraterritoriality

The so-called ''presumption against extraterritorial application'' stands for the proposition that, absent a statutory directive to the contrary, American laws are meant to apply only to activity within U.S. territory. *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991). Because ''Congress legislates against the backdrop of the presumption . . . unless there is 'the affirmative intention of the Congress clearly expressed,' '' courts will presume a law is primarily concerned with domestic conditions. *Arabian American Oil*, 499 at 248 (internal citation omitted). Consequently, an application of the presumption against extraterritoriality in effect represents an adherence to statutory text, *i.e.*, if the

[4] In *Discover Bank*, the California Supreme Court held that a class waiver ''in a consumer contract of adhesion . . . [involving] small amounts of damages . . . [is] unconscionable under California law and should not be enforced.'' *Discover Bank*, 36 4th at 162.

[5] *But see Iskanian v. CLS Trans. L.A., LLC*, 59 Cal. 4th 348, 360 (Cal. 2014) (concluding that ''an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative [Private Attorneys General Act] actions in any forum is contrary to public policy,'' and that the FAA does not preempt California law that prohibits waiver of these actions in an employment contract).

[6] *See, e.g., In re American Express Merchants Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) (refusing to compel individual arbitration where ''the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action'').

[7] The court did not address the option of compelling arbitration on a classwide basis.

[8] Justice Sotomayor recused herself from consideration because she was on the panel that decided the case in the Second Circuit.

[9] *AmEx* already has had a significant impact as numerous federal courts have relied on it in upholding class action waivers. *See, e.g.*, *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1337 (11th Cir. 2014) (relying on *AmEx*, affirming lower court's order compelling arbitration and dismissing plaintiffs complaint); *Raniere v. Citigroup Inc.*, 533 Fed. App'x. 11, 14 (2d Cir. 2013) (enforcing arbitration agreement and class waiver ''in light of the Supreme Court's recent decision in [*AmEx*]''); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013) (a ''class-action waiver is not rendered invalid by virtue of the fact that [plaintiff's] claim is not economically worth pursuing individually''); *Chambers v. Groome Transp. of Alabama*, No. 3:14-cv-237, M.D. Ala. (2014) (finding arbitration agreement and class waiver enforceable because *AmEx* ''confirms that 'the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims' '').

 COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1529-0115

text of the relevant statute does not state that it is meant to apply outside of the United States, it will apply only domestically.

Notwithstanding this presumption, for decades U.S. courts had permitted plaintiffs to maintain securities fraud class actions concerning securities transactions that took place abroad, provided that plaintiffs could show that deceptive conduct occurred, or had substantial effects, in the United States.[10] In 2010, however, the Court issued a landmark decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), relying on the presumption against extraterritoriality to overturn that precedent. *Morrison* involved a Section 10(b) class action lawsuit brought by Australian plaintiffs against an Australian defendant, National Australia Bank Limited (''NAB''), in connection with allegedly fraudulent misrepresentations affecting the value of NAB's securities, which were traded on an Australian exchange. *Id.* at 250. *Morrison* involved a ''foreign-cubed'' action: *foreign* plaintiffs suing a *foreign* issuer for violations of American securities laws based on securities transactions in a *foreign* country. *Id.* at 283 n.11.[11]

The district court dismissed the case for lack of subject-matter jurisdiction, finding that the acts that took place in the U.S. (*i.e.*, NAB's subsidiary allegedly used ''unrealistic financial models'' to inflate its assets) were, ''at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad.'' *In re Nat'l Australia Bank Sec. Litig.*, S.D.N.Y., No. 03-6537, 10/25/06. The Second Circuit affirmed, holding that any acts that may have been performed in this country did not ''compris[e] the heart of the alleged fraud.'' *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 175-76 (2d Cir. 2008) . The Second Circuit's holding was based on the ''conduct test'' and ''effects test,'' which asks ''(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.'' *Id.* at 171.

In an 8-0 decision, the Supreme Court affirmed, but in so doing, rejected the ''conduct and effects'' test in favor of a rigid presumption against extraterritoriality. 561 U.S. at 261 (''The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.'').

Upon its review of the Section 10(b) and Rule 10b-5, the Court found that ''there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.'' *Id.* at 265. The Court's holding was based on devotion to statutory text: ''our function [is] to give the statute the effect its language suggests . . . not to extend it to admirable purposes it might be used to achieve.'' *Id.* at 270.

[10] *See, e.g.*, *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003).

[11] There had, at one point, been an American plaintiff who had invested in NAB's American Depository Receipts, but his claims were dismissed early in the litigation because he failed to allege damages. *Id.* at 252 n.1.

The effect of *Morrison* on class action litigation has been considerable.[12] For instance, *City of Pontiac Policemen's & Firemen's Retirement System v. UBS*, 752 F.3d 173 (2d Cir. 2014), concerned whether *Morrison* precludes Section 10(b) claims made in connection with foreign securities that are cross-listed on an American exchange. Plaintiffs, who were foreign and domestic investors that had purchased UBS shares on a foreign exchange, argued that the fact that UBS shares were cross-listed on the NYSE brought them within the purview of Section 10(b): ''transactions in securities *listed on domestic exchanges*.'' *Id.* at 180 (emphasis added). *City of Pontiac* rejected this argument, noting that *Morrison* focused on where the securities transactions took place. *See id.* (the *Morrison* decision was concerned ''with 'the location of the securities transaction and not the location of an exchange where the security may be dually listed' '').

Thus, the Court found that, under *Morrison*, claims by mostly foreign purchasers of foreign-issued shares on a foreign exchange are not available under Section 10(b), even if the shares are cross-listed domestically. *Id.* at 181. The Second Circuit also held that the location of plaintiffs' buy order (one of the plaintiffs purchased foreign shares by executing a buy order in the U.S.) was not relevant to the *Morrison* analysis. *Id.* (''the allegation that [plaintiff] placed a buy order in the United States that was then executed on a foreign exchange, [does not] standing alone, establish that [plaintiff] incurred irrevocable liability in the United States'').

In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014), the Second Circuit extended *Morrison* by holding that predominantly foreign transactions would not be subject to the federal securities laws merely because the securities transactions in question also involved domestic swap transactions. The plaintiffs in *Parkcentral* invested in securities-based swap agreements that were, in large part, transacted at an investment manager's office in New York. *Id.* at 207. The shares referenced in these swap agreements, however, were traded only on foreign exchanges. *Id.* The Second Circuit affirmed the dismissal of the action, finding that, under *Morrison*, securities laws could not be applied to ''conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges.'' *Id.* at 215-216.

A Change in Course in *Halliburton*

Halliburton II began as a typical stock-drop class action. Plaintiffs alleged that the company made false and misleading statements that artificially inflated the price of Halliburton stock and caused injury to investors after corrective disclosure was made. 134 S. Ct. at 2405-06.

[12] *See, e.g., In re Optimal U.S. Litig.*, 865 F. Supp. 2d 451 (S.D.N.Y. 2012) (dismissing securities class action claims brought by Bahamian plaintiffs based on *Morrison* where share transactions occurred outside of the U.S.); *In re Infineon Techs. AG Sec. Litig.*, N.D. Cal., No. 04-04156, 3/17/11 (under *Morrison*, dismissing securities class action where plaintiffs could not show that the relevant transactions occurred on a domestic exchange); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011) (dismissing RICO class action claims that concerned foreign conduct by defendants and foreign injury by plaintiffs).

Halliburton initially opposed class certification on the ground that plaintiffs had not shown loss causation at the class certification stage. The district court refused to certify the class on this basis, and the case was eventually appealed to the Supreme Court. In 2011, the Supreme Court held that loss causation was not a prerequisite to class certification. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (''*Halliburton I*''). On remand to the district court, the company tried a new tack to defeat certification, arguing that the alleged fraud did not affect the price of its stock, *i.e.*, there was no ''price impact.'' In light of *Halliburton I*, the district court rejected this argument and certified the class. The Fifth Circuit affirmed. 134 S. Ct. at 2406.

But in early 2013, the Court issued an opinion in *Amgen Inc. v. Connecticut Retirement Plan & Trust Funds*, 133 S. Ct. 1184 (2013), holding that securities fraud plaintiffs did not need to prove the materiality of defendants' alleged misrepresentations at the class certification stage in order to invoke the fraud-on-the-market presumption.[13] Most important to Halliburton, however, were the concurring opinions indicating that at least four Justices (Scalia, Kennedy, Thomas and Alito) questioned whether *Basic*'s fraud-on-the-market doctrine was still valid. *See, e.g.*, 133 S. Ct. at 1204 (''recent evidence suggests that the [*Basic*] presumption may rest on a faulty economic premise'') (Alito, J., concurring); *id.* at 1208 (''The *Basic* decision itself is questionable'') (Thomas, J., concurring).

When Halliburton appealed the orders granting certification to the Supreme Court, it directly challenged *Basic*, asking the Court to overrule the fraud-on-the-market presumption of reliance.[14] If plaintiffs could not rely on the *Basic* presumption, each would have to individually demonstrate reliance on the alleged misrepresentation. In that case, individual issues would predominate over class issues, and class certification would be impossible in Section 10(b) cases.

In a 6-3 opinion authored by Justice Roberts, the Court expressly declined to overrule *Basic*'s presumption of reliance. *Halliburton II*, 134 S. Ct. at 2407. Fundamentally, the majority rejected Halliburton's argument that the *Basic* presumption is inconsistent with congressional intent. *Id.* at 2408-09 (''The *Basic* majority did not find that argument persuasive [in 1988], and Halliburton has given us no new reason to endorse it now''). While admitting the *Basic* presumption is a ''judicially created doctrine,'' the Court held that it has become a ''substantive doctrine of federal securities-fraud law.'' *Id.* at 2411.[15] (Quoting *Amgen*, 133 S. Ct. at 1193).

The Court also observed that Congress has had the power to overturn *Basic*—and eliminate the fraud-on-the-market presumption—but has declined to do so, notwithstanding its adoption of legislation in the securities fraud arena (*e.g.*, the Private Securities Litigation Reform Act). Additionally, the majority observed that while the ''efficient capital markets hypothesis may have 'garnered substantial criticism since *Basic*' . . . Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling precedent on the ground that it misunderstood, or has since been overtaken by, economic realities. *Id.* at 2410.

Halliburton II in Context

Halliburton II's reaffirmation of the fraud-on-the-market doctrine appears at odds with the Court's recent class certification jurisprudence, which has, by and large, been based on faithful adherence to statutory text. In its decisions permitting parties to eliminate class procedures in arbitration (*Stolt-Nielsen*, *Concepcion*, and *AmEx*), the Court rooted its decisions in adherence to the FAA. The Court in *Morrison* rejected extraterritorial application of the federal securities laws based on a presumption that requires express statutory language in favor of application outside the And *Dukes*, *Comcast*, and their progeny stand for the proposition that class plaintiffs must actually prove—not simply plead—that the proposed class satisfies each and every requirement of Rule 23. *See, e.g.*, *Dukes*, 131 S. Ct. at 2551 (''actual, not presumed'' conformance with the Rule 23 requirements remains ''indispensable'').

In re-affirming *Basic*, however, the *Halliburton II* Court upheld a judge-made principle (one clearly found nowhere in the statute's text and arguably contrary to the holdings in *Dukes* and *Comcast*) that permits securities fraud plaintiffs to obtain class certification without actually showing that common issues related to reliance predominate over individual issues.

The concurring opinion in *Halliburton II*, authored by Justice Thomas,[16] pointed out the apparent inconsistency with *Dukes* and *Comcast*, both of which ''require

[13] *Amgen* determined that because the materiality determination is ''an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor . . . [it] can be proved through evidence common to the class.'' *Id.* at 1195. (internal quotation marks and citation omitted). In other words, because any plaintiff's subjective view of the importance of the information in question is irrelevant, the court's determination of whether the alleged misstatements are material will apply to the entire class. Thus, the materiality of those statements is a ''common question'' for the purposes of Rule 23. For more on *Amgen*, *see* Jason M. Halper, *et al.*, *Class Action Issues in Supreme Court: Assessing the Significance of* Amgen, New York Law Journal, Apr. 3, 2013.

[14] Alternatively, Halliburton asked the Court to require plaintiffs to introduce evidence of price impact at the class certification stage, or at least permit defendants to rebut price impact at class certification.

[15] The Court did not, however, completely leave securities defendants hanging out to dry. Indeed, *Halliburton II* accepted one of Halliburton's alternatives to eliminating outright the fraud-on-the-market presumption, finding that defendants must be given the opportunity to demonstrate, and courts must assess whether there is, a lack of price impact from the misrepresentations at issue at the class certification stage. *See Halliburton II*, 134 S. Ct. at 2416 (*Basic* ''does not require courts to ignore a defendant's direct . . . salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the Basic presumption does not apply.''). Although it remains to be seen how useful this carve-out will be for defendants, early returns suggest that defendants are making an effort to rebut price impact. *See, e.g.*, *Local 703 v. Regions Fin. Corp.*, 762 F. 3d 1248, 1258-59 (11th Cir. 2014) (vacating certification order and remanding in light of *Halliburton II* to allow defendants to bring price impact rebuttal evidence); *Aranaz v. Catalyst Pharm. Partners Inc.*, S.D. Fla., No. 13-23878, 9/29/14 (under *Halliburton II*, permitting defendant an opportunity at the class certification stage to attempt to rebut price impact).

[16] Justice Thomas was joined by Justices Scalia and Alito in an opinion that, although concurring in name, reads like a dissent.

 COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN 1529-0115

plaintiffs seeking class certification to 'affirmatively demonstrate' certification requirements like the predominance of common questions.'' 134 S. Ct. at 2420. Justice Thomas wrote that *Basic* and *Halliburton* ''exempt[] Rule 10b-5 plaintiffs from Rule 23's proof requirement,'' essentially permitting ''an end run'' around the Rule. *Id.* at 2423-24.

There is no clear explanation for the outcome in *Halliburton* relative to the Court's recent class action jurisprudence. One answer may lie in the majority's (and particularly Justice Roberts' and Kennedy's) obvious discomfort with throwing out 25 years of precedent and a presumption that had become a bedrock principle of private securities litigation. Indeed, the Court found that *stare decisis*, the idea that courts should not disturb settled points of law, had ''special force'' in this case. *Id.* at 2411.

It is true that overruling *Basic* would have effectively eliminated plaintiffs' ability to assert Section 10(b) claims via a class action. This, perhaps, was a bridge too far for the *Halliburton II* majority. The decision calls to mind the late Chief Justice Rehnquist's evolution on the issue of requiring police to issue *Miranda* warnings. After years of criticizing *Miranda v. Arizona*, 384 U.S. 436 (1966), as judge-made law and judicial overreach, the Chief Justice voted to uphold it on the basis of *stare decisis*, finding that ''*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.'' *Dickerson v. United States*, 530 U.S. 428, 443 (2000). So too here with *Basic*, where, to the majority, the fraud-on-the-market presumption had become part of the fabric of American securities litigation.

Defendants Are Utilizing the Supreme Court Precedent

Notwithstanding and aside from the outcome in *Halliburton* II, we expect defendants to continue to push the bounds of decisions such as *AmEx*, *Dukes*, and *Morrison*, and to make maximum use of the Supreme Court's directive in *Halliburton II* that lower courts must address at class certification arguments by defendants that alleged misstatements had no impact on the price of the security in question. Defendants are or in appropriate circumstances should be taking advantage of these decisions.

■ Companies will seek to limit class procedures in arbitration. While already a relatively common feature in consumer and vendor contracts, such clauses now are appearing or could be included in contracts governing other types of business relationships, including broker-dealer agreements or corporate bylaws. For example, in 2011, Charles Schwab & Co. amended its customer agreements to require individual arbitration of disputes. A FINRA hearing panel initially held that the FAA precluded enforcement of FINRA rules prohibiting arbitration and class waiver provisions in customer account agreements. However, in *In re Charles Schwab & Co.,* FINR No. 2011029760201 (Apr. 24, 2014), FINRA partially reversed its earlier ruling and found that Schwab violated FINRA rules providing that ''[c]lass action claims may not be arbitrated under the Code,'' and that a ''member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action.'' FINRA Rule 12204(a) & (d). Schwab agreed to pay a $500 million fine and to notify its customers that the class waiver requirement had been withdrawn. Although Schwab settled the matter rather than appeal the decision, it is by no means certain that FINRA's decision would have withstood scrutiny in federal court.

■ In light of *Dukes* and *Comcast*, Defendants successfully have defeated class certification by insisting that courts rigorously apply the Rule 23 criteria at the class certification stage. *See, e.g.*, *Ouedraogo v. A-1 Int'l Courier Serv., Inc.*, No. 12-5651 (S.D.N.Y Sept. 18, 2014) (denying class certification because plaintiff ''failed to prove the necessary prerequisite of commonality''); *Bank v. Caribbean Cruise Line, Inc.*, No. 12-5572 (E.D.N.Y. Aug. 27, 2014) (''I conclude that Rule 23's requirement of adequate representation is not satisfied and the motion for class certification is therefore denied.''); *Enriquez v. Cherry Hill Market Corp.*, 993 F. Supp. 2d 229, 236 (E.D.N.Y. 2013) (denying class certification where plaintiffs ''failed to establish predominance and superiority requirements''); *Medina v. Public Storage, Inc.*, No. 12-170 (N.D. Ill. April 30, 2014) (denying class certification motion because plaintiff ''failed to meet her burden of establishing typicality''); *Sturdy v. A.F. Hauser Inc.*, No. 13-3379 (C.D. Ill. May 28, 2014) (''this court concludes that Plaintiff has not met the numerosity requirement of Rule 23(a)(1)'').

■ Defendants will seek to apply *Morrison*'s presumption against extraterritoriality outside of the context of securities fraud or to cases with greater domestic contacts than *Morrison* (*i.e.*, foreign squared, etc.). We are already seeing examples. *See, e.g.*, *Liu v. Siemens AG*, 763 F.3d 175, 183 (2d Cir. 2014) (citing to *Morrison* and finding ''no explicit statutory evidence that Congress meant for [Dodd-Frank's whistleblower] antiretaliation provision to apply extraterritorially''); *Petroleos Mexicanos v. SK Engineering & Constr. Co.*, No. 12-9070 (S.D.N.Y. June 30, 2013) (applying *Morrison* to dismiss claims under the Rackateer Influenced and Corrupt Organizations Act because ''RICO statutes do not apply extraterritorially'').

■ Defendants will aggressively seek to defeat certification of Section 10(b) classes under *Halliburton II* by showing the absence of price impact. Indeed, post-*Halliburton II*, there are already numerous examples of defendants introducing price impact evidence at the class certification stage. *See, e.g.*, *Local 703 v. Regions Fin. Corp.*, 762 F.3d 1248, 1258-59 (11th Cir. 2014); *McIntire v. China MediaExpress Holdings, Inc.*, No 11-804 (S.D.N.Y. August 15, 2014); *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, No. 11-429 (D. Minn. 2014). Interestingly, *Halliburton II* can be seen as limiting the force of *Amgen*, in that it seems to present defendants with an opportunity to avoid certification with proof that might otherwise go solely to the merits.